In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-426

U. S. BRATTON, JR., EXECUTOR, ESTATE OF PHYLLIS ELLERTON MCCORD, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition in this federal estate tax case is whether petitioner, an executor of an estate, was entitled to introduce evidence extrinsic to the decedent's will in support of his claim on behalf of the estate for a charitable deduction under Section 2055 of the Internal Revenue Code of 1954. The decision below held that the decedent's intent was clearly shown by the will, so that no extrinsic evidence was admissible.

The pertinent facts are as follows: The decedent, Phyllis Ellerton McCord, died in 1968. She was sur-

vived by her daughter who has been afflicted since birth with severe mental retardation, and who resided in an institution at the time of her mother's death. The daughter will be institutionalized for life (Pet. App. A 15; Pet. App. B 22–23; Pet. 3).

In her will, the decedent established a testamentary trust for the residue of her estate. The will provided for the trust income to be expended for the support, maintenance and welfare of the daughter, and, upon the daughter's death, for distribution of the remaining principal and income to designated charities. The trustees were authorized to invade principal if the trust income proved to be inadequate to provide the daughter with the necessaries of life in keeping with her accustomed standard (Pet. App. B 23–24).

The will gave the trustees, in their sole discretion, the power to distribute income in excess of the amount necessary for the support and maintenance of the daughter to the institution in which decedent's daughter may reside. The will stated that it was the primary objective of the decedent that the trustees made certain that whatever funds are employed for the betterment of the condition under which the daughter was living, be directed especially toward improvements in the particular area of the institution in which the daughter was living. The will also gave the trustees power to distribute the entire trust income and principal if they concluded that it was in the best interest of the daughter. Finally, the will provided that upon the termination of the trust or in the event the daughter predeceases the decedent, the principal and accu-

mulated income shall be distributed to the trustees of the Episcopal Diocese of Michigan for the purposes of establishing and maintaining a home for retarded children and adults (Pet. App. B 23–24; Pet. 5).

The estate claimed a charitable deduction for the alleged value of the charitable interests. On audit, the Commissioner disallowed the deduction. In this refund suit, the district court entered summary judgment for the government (Pet. App. A 21), and the court of appeals affirmed (Pet. App. B 22–30).

It is well settled by the decisions of this Court that when a testamentary trust provides benefits for a private beneficiary as well as for charity, a charitable estate tax deduction is available only to the extent that the value of the charitable interests, as of the time of death of the decedent, is "presently ascertainable, and hence severable from the non-charitable interest." Treasury Regulations, Section 20.2055–2(a). In order to preserve a charitable deduction, the trustee's power to invade must be governed by an ascertainable standard contained in the trust instrument, *i.e.*, a standard "fixed in fact and capable of being stated in definite terms of money." *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154. Accord: *Merchants Bank* v. *Commissioner*, 320 U.S. 256; *Henslee* v. *Union Planters Bank*, 335 U.S. 595.

Here, the decedent's will unquestionably authorized the trustees to distribute surplus trust income to a noncharitable institution where the daughter might reside, and also to terminate the trust and distribute trust income and principal at any time if in their judgment such action would be in the best interest of

the daughter. As a result, the courts below correctly held that the will did not limit these powers by any ascertainable standards.

Petitioner concedes (Pet. 7) that, assuming *arguendo* the correctness of the construction given to the will by the courts below, the substantive decision in this case is correct. He argues (Pet. 7–11, 12–13), however, that Michigan law compelled the district court to hear evidence extrinsic to the will, and that summary judgment was therefore improper. But under Michigan law, as elsewhere, the applicable principle in the interpretation of wills is that all parts of the will must be considered in order to ascertain the intention of the testator. See *In re Lawton Estate*, 347 Mich. 143, 145, 79 N.W. 2d 463, 464.

After examining the decedent's will, the court of appeals concluded that her overriding concern, as expressed in her will, was "to guarantee that the trust income and principal would be used for the 'best interest' of her daughter" (Pet. pp. B 30). Since the terms of the will were not ambiguous, no extrinsic evidence could be considered under Michigan law. Petitioner's contention under the applicable state law does not warrant review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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